

**FEDERAL PRACTICE SEMINAR
READINGS FOR SESSION TWO—JURISDICTION
APRIL 16, 2003**

The United States Constitution

United States Constitution, article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Charles W. BAKER et al., Appellants,

v.

Joe C. CARR et al.

369 U.S. 186 (1962)

Mr. Justice BRENNAN delivered the opinion of the Court.

This civil action was brought under 42 U.S.C. §§ 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleging that by means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State's 95 counties, 'these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes,' was dismissed by a three-judge court convened under 28 U.S.C. § 2281 in the Middle District of Tennessee. The court held that it lacked jurisdiction of the subject matter and also that no claim was stated upon which relief could be granted.

* * *

IV. JUSTICIABILITY.

In holding that the subject matter of this suit was not justiciable, the District Court relied on *Colegrove v. Green*, *supra*, and subsequent *per curiam* cases. The court stated: 'From a review of these decisions there can be no doubt that the federal rule * * * is that the federal courts * * * will not intervene in cases of this type to compel legislative reapportionment.' 179 F.Supp. at 826. We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a 'political question' and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable 'political question.' The cited cases do not hold the contrary.

Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection 'is little more than a play upon words.' *Nixon v. Herndon*, 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759. Rather, it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government, and that complaints based on that clause have been held to present political questions which are nonjusticiable.

* * *

We have said that 'In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.' *Coleman v. Miller*, 307 U.S. 433, 454--455, 59 S.Ct. 972, 982, 83 L.Ed. 1385. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the

Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine. We shall then show that none of those threads catches this case.

* * *

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.

* * *

We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Justiciability: standing doctrine

VALLEY FORGE CHRISTIAN COLLEGE, Petitioner
v.
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., et al.

454 U.S. 464 (1982)

Justice REHNQUIST delivered the opinion of the Court.

I

Article IV, § 3, cl. 2, of the Constitution vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the ... Property belonging to the United States." Shortly after the termination of hostilities in the Second World War, Congress enacted the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended, 40 U.S.C. § 471 *et seq.* (1976 ed. and Supp. III). The Act was designed, in part, to provide "an economical and efficient system for ... the disposal of surplus property." 63 Stat. 378, 40 U.S.C. 471. In furtherance of this policy, federal agencies are directed to maintain adequate inventories of the property under their control and to identify excess property for transfer to other agencies able to use it. See 63 Stat. 384, 40 U.S.C. 48b), (c). Property that has outlived its usefulness to the Federal Government is declared "surplus" and may be transferred to private or other public entities.

* * *

The property which spawned this litigation was acquired by the Department of the Army in 1942, as part of a larger tract of approximately 181 acres of land northwest of Philadelphia. The Army built on that land the Valley Forge General Hospital, and for 30 years thereafter, that hospital provided medical care for members of the Armed Forces. In April 1973, as part of a plan to reduce the number of military installations in the United States, the Secretary of Defense proposed to close the hospital, and the General Services Administration declared it to be "surplus property."

* * *

In September 1976, respondents Americans United for Separation of Church and State, Inc. (Americans United), and four of its employees, learned of the conveyance through a news release. Two months later, they brought suit in the United States District Court for the District of Columbia, later transferred to the Eastern District of Pennsylvania, to challenge the conveyance on the ground that it violated the Establishment Clause of the First Amendment. In its amended complaint, Americans United described itself as a nonprofit organization composed of 90,000 "taxpayer members." The complaint asserted that each member "would be deprived of the fair and constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution." Respondents sought a declaration that the conveyance was null and void, and an order compelling petitioner to transfer the property back to the United States.

On petitioner's motion, the District Court granted summary judgment and dismissed the complaint. The court found that respondents lacked standing to sue as taxpayers under *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), and had "failed to allege that they have suffered any actual or concrete injury beyond a generalized grievance common to all taxpayers."

Respondents appealed to the Court of Appeals for the Third Circuit, which reversed the

judgment of the District Court by a divided vote.

II

Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity to adjudge the legal rights of litigants in actual controversies." *Liverpool S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885). The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 402, 36 L.Ed. 176 (1892). Otherwise, the power "is not judicial ... in the sense in which judicial power is granted by the Constitution to the courts of the United States." *United States v. Ferreira*, 13 How. 40, 48, 14 L.Ed. 42 (1852).

As an incident to the elaboration of this bedrock requirement, this Court has always required that a litigant have "standing" to challenge the action sought to be adjudicated in the lawsuit. The term "standing" subsumes a blend of constitutional requirements and prudential considerations, see *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975), and it has not always been clear in the opinions of this Court whether particular features of the "standing" requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution. See *Flast v. Cohen*, *supra*, at 97, 88 S.Ct., at 1951.

A recent line of decisions, however, has resolved that ambiguity, at least to the following extent: at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976). In this manner does Art. III limit the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S., at 97, 88 S.Ct., at 1951.

The requirement of "actual injury redressable by the court," *Simon*, *supra*, 426 U.S., at 39, 96 S.Ct., at 1924, serves several of the "implicit policies embodied in Article III," *Flast*, *supra*, 392 U.S., at 96, 88 S.Ct., at 1950. It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. The "standing" requirement serves other purposes. Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.

The Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order. The federal courts have abjured appeals to their authority which would convert the judicial process into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973). Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums. As we said in *Sierra Club v. Morton*, 405 U.S. 727, 740, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972):

"The requirement that a party seeking review must allege facts showing that he is himself adversely affected ... does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."

The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show "injury in fact" resulting from the action which they seek to have the court adjudicate.

The exercise of the judicial power also affects relationships between the coequal arms of the National Government. The effect is, of course, most vivid when a federal court declares unconstitutional an act of the Legislative or Executive Branch. While the exercise of that "ultimate and supreme function," *Chicago & Grand Trunk R. Co. v. Wellman*, *supra*, at 345, 12 S.Ct., at 402, is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role.

While the propriety of such action by a federal court has been recognized since *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), it has been recognized as a tool of last resort on the part of the federal judiciary throughout its nearly 200 years of existence:

"[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches." *United States v. Richardson*, 418 U.S., at 188, 94 S.Ct., at 2952 (POWELL, J., concurring).

Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury. Thus, this Court has "refrain[ed]" from passing upon the constitutionality of an act [of the representative branches] unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Blair v. United States*, 250 U.S. 273, 279, 39 S.Ct. 468, 470, 63 L.Ed. 979 (1919). The importance of this precondition should not be underestimated as a means of "defin[ing] the role assigned to the judiciary in a tripartite allocation of power." *Flast v. Cohen*, *supra*, at 95.

Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S., at 499, 95 S.Ct., at 2205. In addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of

Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. *Id.*, at 499-500, 95 S.Ct., at 2205-2206. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Orgs. v. Camp*, 397 U.S.150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970).

Merely to articulate these principles is to demonstrate their close relationship to the policies reflected in the Art. III requirement of actual or threatened injury amenable to judicial remedy. But neither the counsels of prudence nor the policies implicit in the "case or controversy" requirement should be mistaken for the rigorous Art. III requirements themselves. Satisfaction of the former cannot substitute for a demonstration of " 'distinct and palpable injury' ... that is likely to be redressed if the requested relief is granted." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S., at 100, 99 S.Ct., at 1608 (quoting *Warth v. Seldin*, *supra*, 422 U.S., at 501, 95 S.Ct., at 2206). That requirement states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called "prudential" considerations.

We need not mince words when we say that the concept of "Art. III standing" has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one- sentence or one-paragraph definition. But of one thing we may be sure: Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States. Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits" of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created a general government, provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals.

* * *

Were we to accept respondents' claim of standing in this case, there would be no principled basis for confining our exception to litigants relying on the Establishment Clause. Ultimately, that exception derives from the idea that the judicial power requires nothing more for its invocation than important issues and able litigants. The existence of injured parties who might not wish to bring suit becomes irrelevant. Because we are unwilling to countenance such a departure from the limits on judicial power contained in Art. III, the judgment of the Court of Appeals is reversed.

Federal question jurisdiction

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

OSBORN and others, *Appellants*,
v.
The PRESIDENT, DIRECTORS, AND COMPANY OF THE
BANK OF THE UNITED STATES, *Respondents*.
22 U.S. (9 Wheat.) 738 (1824)

Mr. Chief Justice MARSHALL delivered the opinion of the Court, and, after stating the case, proceeded as follows:

At the close of the argument, a point was suggested, of such vital importance, as to induce the Court to request that it might be particularly spoken to. That point is, the right of the Bank to sue in the Courts of the United States. It has been argued, and ought to be disposed of, before we proceed to the actual exercise of jurisdiction, by deciding on the rights of the parties.

The appellants contest the jurisdiction of the Court on two grounds:

1st. That the act of Congress has not given it.

2d. That, under the constitution, Congress cannot give it.

1. The first part of the objection depends entirely on the language of the act. The words are, that the Bank shall be 'made able and capable in law,' 'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States.'

These words seem to the Court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right 'to sue and be sued,' 'in every Circuit Court of the United States,' and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose. The argument of the appellants is founded on the opinion of this Court, in *The Bank of the United States v. Deveaux*, (5 Cranch. 85.) In that case it was decided, that the former Bank of the United States was not enabled, by the act which incorporated it, to sue in the federal Courts. The words of the 3d section of that act are, that the Bank may 'sue and be sued,' &c. 'in Courts of record, or any other place whatsoever.' The Court was of opinion, that these general words, which are usual in all acts of incorporation, gave only a general capacity to sue, not a particular privilege to sue in the Courts of the United States; and this opinion was strengthened by the circumstance that the 9th rule of the 7th section of the same act, subjects the directors, in case of excess in contracting debt, to be sued in their private capacity, 'in any Court of record of the United States, or either of them.' The express grant of

jurisdiction to the federal Courts, in this case, was considered as having some influence on the construction of the general words of the 3d section, which does not mention those Courts. Whether this decision be right or wrong, it amounts only to a declaration, that a general capacity in the Bank to sue, without mentioning the Courts of the Union, may not give a right to sue in those Courts. To infer from this, that words expressly conferring a right to sue in those Courts, do not give the right, is surely a conclusion which the premises do not warrant.

The act of incorporation, then, confers jurisdiction on the Circuit Courts of the United States, if Congress can confer it.

2. We will now consider the constitutionality of the clause in the act of incorporation, which authorizes the Bank to sue in the federal Courts.

In support of this clause, it is said, that the legislative, executive, and judicial powers, of every well constructed government, are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law. All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we examine the constitution of the United States, we find that its framers kept this great political principle in view. The 2d article vests the whole executive power in the President; and the 3d article declares, 'that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.'

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.

The suit of *The Bank of the United States v. Osborn and others*, is a case, and the question is, whether it arises under a law of the United States?

The appellants contend, that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of Congress.

If this were sufficient to withdraw a case from the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action, be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the Court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the Courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

* * *

The constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates

cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate, that in any such case, the power cannot be exercised in its original form by Courts of original jurisdiction. It is not insinuated, that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance, in the Courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.

We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the Circuit Courts original jurisdiction, in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will.

We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

* * *

GULLY, State Tax Collector,
v.
FIRST NAT. BANK IN MERIDIAN.

299 U.S. 109 (1936)

Mr. Justice CARDOZO delivered the opinion of the Court.

Whether a federal court has jurisdiction of this suit as one arising under the Constitution and laws of the United States is the single question here.

Petitioner, plaintiff in the court below, sued the respondent in a state court in Mississippi to recover a money judgment. The following facts appear on the face of the complaint: In June, 1931, the assets of the First National Bank of Meridian, a national banking association, were conveyed to the respondent, the First National Bank in Meridian, under a contract whereby the debts and liabilities of the grantor, insolvent at the time and in the hands of a receiver, were assumed by the grantee, which covenanted to pay them. Among the debts and liabilities so assumed were moneys owing to the petitioner, the state collector of taxes, or now claimed to be owing to him, for state, county, city, and school district taxes. In form the assessment was imposed upon the shares or capital stock of the bank, its surplus and undivided profits, exclusive of the value of the real estate. In law, so the pleader states, all taxes thus assessed were debts owing by the shareholders, which the bank was under a duty to pay as their agent out of moneys belonging to them, then in its possession. The new bank, in violation of its covenant, failed to pay the taxes of the old bank, which it had thus assumed and made its own. Judgment is demanded for the moneys due under the contract.

A petition was filed by the respondent for the removal of the cause to the federal court upon the ground that the suit was one arising 'under the Constitution or laws of the United States.' Judicial Code s 28, 28 U.S.C. s 71. Cf. Judicial Code s 24(1)(a), 28 U.S.C. s 41(1)(a). The state court made an order accordingly, and the federal District Court denied a motion to remand. Later, after a trial upon the merits, the complaint was dismissed. The Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of dismissal, overruling the objection that the cause was one triable in the courts of Mississippi. 81 F.(2d) 502. The decision was put upon the ground that the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute (R.S. s 5219, as amended, 12 U.S.C. s 548, and that by necessary implication a plaintiff counts upon the statute in suing for the tax. Because of the importance of the ruling, this Court granted certiorari, 'limited to the question of the jurisdiction of the District Court.' 298 U.S. 650, 56 S.Ct. 939. 80 L.Ed. 1393.

How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Starin v. New York*, 115 U.S. 248, 257, 6 S.Ct. 28, 29 L.Ed. 388; *First National Bank v. Williams*, 252 U.S. 504, 512, 40 S.Ct. 372, 374, 64 L.Ed. 690. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Id.*; *County v. Seattle School District*, 263 U.S. 361, 363, 364, 44 S.Ct. 127, 128, 68 L.Ed. 339. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (*New Orleans v. Benjamin*, 153 U.S. 411, 424, 14 S.Ct. 905, 38

L.Ed. 764; *Defiance Water Co. v. Defiance*, 191 U.S. 184, 191, 24 S.Ct. 63, 48 L.Ed. 140; *Joy v. St. Louis*, 201 U.S. 332, 26 S.Ct. 478, 50 L.Ed. 776; *City and County of Denver v. New York Trust Co.*, 229 U.S. 123, 133, 33 S.Ct. 657, 57 L.Ed. 1101), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. (*Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed. 511; *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126; *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.Ed. 716; *Taylor v. Anderson*, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218). Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. *Devine v. Los Angeles*, 202 U.S. 313, 334, 26 S.Ct. 652, 50 L.Ed. 1046; *The Fair v. Kohler Die & Specialty Co.*, *supra*.

Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed. This is seen particularly in suits by or against a corporation deriving its charter from an act of Congress. *Osborn v. Bank of the United States*, 9 Wheat. 738, 817--828, 6 L.Ed. 204; *Pacific Railroad Removal Cases*, 115 U.S. 1, 11, 5 S.Ct. 1113, 29 L.Ed. 319. Modern statutes have greatly diminished the importance of those decisions by narrowing their scope. *Gay v. Ruff*, 292 U.S. 25, 35, 54 S.Ct. 608, 613, 78 L.Ed. 1099, 92 A.L.R. 970; *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 483, 53 S.Ct. 447, 449, 450, 77 L.Ed. 903. Federal incorporation is now abolished as a ground of federal jurisdiction except where the United States holds more than one-half the stock. Act of February 13, 1925, c. 229, s 12, 43 Stat. 936, 941 28 U.S.C.A. s 42). Partly under the influence of statutes disclosing a new legislative policy, partly under the influence of more liberal decisions, the probable course of the trial, the real substance of the controversy, has taken on a new significance. 'A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.' *Shulthis v. McDougal*, 225 U.S. 561, 569, 32 S.Ct. 704, 706, 56 L.Ed. 1205. Cf. *First National Bank v. Williams*, *supra*; *Hopkins v. Walker*, 244 U.S. 486, 489, 37 S.Ct. 711, 61 L.Ed. 1270; *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 507, 20 S.Ct. 726, 44 L.Ed. 864. Only recently we said after full consideration that the doctrine of the charter cases was to be treated as exceptional, though within their special field there was no thought to disturb them. *Puerto Rico v. Russell & Co.*, *supra*. 'We should fly in the face of this legislative policy and disregard precedents which we think controlling were we to extend the doctrine now.' *Id.* Today, even more clearly than in the past, 'the federal nature of the right to be established is decisive--not the source of the authority to establish it.' *Id.*

Viewing the case at hand against this background of established principle, we do not find in it the elements of federal jurisdiction.

1. The suit is built upon a contract which in point of obligation has its genesis in the law of Mississippi. A covenant for a valuable consideration to pay another's debts is valid and enforceable without reference to a federal law. For all that the complaint informs us, the failure to make payment was owing to lack of funds or to a belief that a stranger to the contract had no standing as a suitor or to other objections nonfederal in their nature. There is no necessary connection between the enforcement of such a contract according to its terms and the existence of a controversy arising under federal law.

2. The obligation of the contract being a creation of the state, the question remains

whether the plaintiff counts upon a federal right in support of his claim that the contract has been broken. The performance owing by the defendant was payment of the valid debts, and taxes are not valid debts unless lawfully imposed. From this defendant argues that a federal controversy exists, the tax being laid upon a national bank or upon the shareholders therein, and for that reason being void unless permitted by the federal law.

Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy, if valid as a tax at all, was imposed under the authority of a statute of Mississippi.

* * *

The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, to far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.

This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67, 68, 53 S.Ct. 278, 280, 77 L.Ed. 619. To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end.. *Bird v. St. Paul, F. & M. Insurance Co.*, 224 N.Y. 47, 51, 120 N.E. 86, 13 A.L.R. 875; *Leyland Shipping Co. v. Norwich Fire Insurance Society*, (1918) A.C. 350, 369; *Aetna Insurance Co. v. Boon*, 95 U.S. 117, 130, 24 L.Ed. 395; *Milwaukee & St. Paul R. Co. v. Kellogg*, 94 U.S. 469, 474, 24 L.Ed. 256. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

The judgment should be reversed and the cause remitted to the District Court, with instructions to remand it to the court in Mississippi from which it was removed.

Reversed.

MERRELL DOW PHARMACEUTICALS INC., Petitioner

v.

Larry James Christopher THOMPSON, et ux., et al.

478 U.S. 804 (1986)

Justice STEVENS delivered the opinion of the Court.

The question presented is whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331.

I

The Thompson respondents are residents of Canada and the MacTavishes reside in Scotland. They filed virtually identical complaints against petitioner, a corporation, that manufactures and distributes the drug Bendectin. The complaints were filed in the Court of Common Pleas in Hamilton County, Ohio. Each complaint alleged that a child was born with multiple deformities as a result of the mother's ingestion of Bendectin during pregnancy. In five of the six counts, the recovery of substantial damages was requested on common-law theories of negligence, breach of warranty, strict liability, fraud, and gross negligence. In Count IV, respondents alleged that the drug Bendectin was "misbranded" in violation of the Federal Food, Drug, and Cosmetic Act (FDCA), 52 Stat. 1040, as amended, 21 U.S.C. § 301 *et seq.* (1982 ed. and Supp. III), because its labeling did not provide adequate warning that its use was potentially dangerous. Paragraph 26 alleged that the violation of the FDCA "in the promotion" of Bendectin "constitutes a rebuttable presumption of negligence." Paragraph 27 alleged that the "violation of said federal statutes directly and proximately caused the injuries suffered" by the two infants. App. 22, 32.

Petitioner filed a timely petition for removal from the state court to the Federal District Court alleging that the action was "founded, in part, on an alleged claim arising under the laws of the United States." After removal, the two cases were consolidated. Respondents filed a motion to remand to the state forum on the ground that the federal court lacked subject-matter jurisdiction. Relying on our decision in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921), the District Court held that Count IV of the complaint alleged a cause of action arising under federal law and denied the motion to remand. It then granted petitioner's motion to dismiss on *forum non conveniens* grounds.

The Court of Appeals for the Sixth Circuit reversed. . . .

II

Article III of the Constitution gives the federal courts power to hear cases "arising under" federal statutes. That grant of power, however, is not self-executing, and it was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction. [FN4] Although the constitutional meaning of "arising under" may extend to all cases in which a federal question is "an ingredient" of the action, *Osborn v. Bank of the United States*, 9 Wheat.

738, 823, 6 L.Ed. 204 (1824), we have long construed the statutory grant of federal-question jurisdiction as conferring a more limited power. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-495, 103 S.Ct. 1962, 1971-1972, 76 L.Ed.2d 81 (1983); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379, 79 S.Ct. 468, 483, 3 L.Ed.2d 368 (1959).

Under our longstanding interpretation of the current statutory scheme, the question whether a claim "arises under" federal law must be determined by reference to the "well-pleaded complaint." *Franchise Tax Board*, 463 U.S., at 9-10, 103 S.Ct., at 2846-2847. A defense that raises a federal question is inadequate to confer federal jurisdiction. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Since a defendant may remove a case only if the claim could have been brought in federal court, 28 U.S.C. § 1441(b), moreover, the question for removal jurisdiction must also be determined by reference to the "well-pleaded complaint."

As was true in *Franchise Tax Board*, *supra*, the propriety of the removal in this case thus turns on whether the case falls within the original "federal question" jurisdiction of the federal courts. There is no "single, precise definition" of that concept; rather, "the phrase 'arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Id.*, 463 U.S., at 8, 103 S.Ct., at 2846.

This much, however, is clear. The "vast majority" of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that a " 'suit arises under the law that creates the cause of action.' " *Id.*, at 8-9, 103 S.Ct., at 2846, quoting *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed.2d 987 (1916). Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action.

We have, however, also noted that a case may arise under federal law "where the vindication of a right under state law necessarily turned on some construction of federal law." *Franchise Tax Board*, 463 U.S., at 9, 103 S.Ct., at 2846. [FN5] Our actual holding in *Franchise Tax Board* demonstrates that this statement must be read with caution; the central issue presented in that case turned on the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982 ed. and Supp. III), but we nevertheless concluded that federal jurisdiction was lacking.

This case does not pose a federal question of the first kind; respondents do not allege that federal law creates any of the causes of action that they have asserted.. This case thus poses what Justice Frankfurter called the "litigation-provoking problem," *Workers v. Lincoln Mills*, 353 U.S. 448, 470, 77 S.Ct. 912, 928, 1 L.Ed.2d 972 (1957) (dissenting opinion)--the presence of a federal issue in a state-created cause of action.

* * *

In this case, both parties agree with the Court of Appeals' conclusion that there is no federal cause of action for FDCA violations. For purposes of our decision, we assume that this is a correct interpretation of the FDCA. . . .

The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that it would flout congressional intent to provide a private federal remedy for the violation of the federal statute. We think it would similarly flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a "rebuttable presumption" or a

"proximate cause" under state law, rather than a federal action under federal law.

III

Petitioner advances three arguments to support its position that, even in the face of this congressional preclusion of a federal cause of action for a violation of the federal statute, federal-question jurisdiction may lie for the violation of the federal statute as an element of a state cause of action.

First, petitioner contends that the case represents a straightforward application of the statement in *Franchise Tax Board* that federal-question jurisdiction is appropriate when "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims." 463 U.S., at 13, 103 S.Ct., at 2848. *Franchise Tax Board*, however, did not purport to disturb the long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction. Indeed, in determining that federal-question jurisdiction was not appropriate in the case before us, we stressed Justice Cardozo's emphasis on principled, pragmatic distinctions: " 'What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation ... a selective process which picks the substantial causes out of the web and lays the other ones aside.' " *Id.*, at 20-21, 103 S.Ct., at 2852 (quoting *Gully v. First National Bank*, 299 U.S. 109, 117-118, 57 S.Ct. 96, 99-100, 81 L.Ed. 70 (1936)).

Far from creating some kind of automatic test, *Franchise Tax Board* thus candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction. Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. This conclusion is fully consistent with the very sentence relied on so heavily by petitioner. We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.

* * *

IV

We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

The judgment of the Court of Appeals is affirmed.

Justice BRENNAN, with whom Justice WHITE, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

* * *

There is, to my mind, no question that there is federal jurisdiction over the respondents' fourth cause of action under the rule set forth in *Smith* and reaffirmed in *Franchise Tax Board*. Respondents pleaded that petitioner's labeling of the drug Bendectin constituted "misbranding" in violation of §§ 201 and 502(f)(2) and (j) of the Federal Food, Drug, and Cosmetic Act (FDCA), 52 Stat. 1040, as amended, 21 U.S.C. § 301 et seq. (1982 ed. and Supp. III), and that this violation "directly and proximately caused" their injuries. App. 21-22 (Thompson complaint), 31-32 (MacTavish complaint). Respondents asserted in the complaint that this violation established petitioner's negligence per se and entitled them to recover damages without more. *Ibid.* No other basis for finding petitioner negligent was asserted in connection with this claim. As pleaded, then, respondents' "right to relief depend[ed] upon the construction or application of the Constitution or laws of the United States." *Smith*, 255 U.S., at 199, 41 S.Ct., at 244; see also *Franchise Tax Board*, 463 U.S., at 28, 103 S.Ct., at 2856 (there is federal jurisdiction under § 1331 where the plaintiff's right to relief "necessarily depends" upon resolution of a federal question). Furthermore, although petitioner disputes its liability under the FDCA, it concedes that respondents' claim that petitioner violated the FDCA is "colorable, and rests upon a reasonable foundation." *Smith*, supra, 255 U.S., at 199, 41 S.Ct., at 245. . . . Petitioner's principal defense is that the Act does not govern the branding of drugs that are sold in foreign countries. It is certainly not immediately obvious whether this argument is correct. Thus, the statutory question is one which "discloses a need for determining the meaning or application of [the FDCA]," *T.B. Harms Co. v. Eliscu*, 339 F.2d, at 827 and the claim raised by the fourth cause of action is one "arising under" federal law within the meaning of § 1331.

Diversity Jurisdiction

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

- (1) a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and
- (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Kay H. SCOGGINS, Plaintiff-Appellant,
v.
Charles Eugene POLLOCK, M.D., John Edward Pollock, M.D., Medical Clinic, P.C.,
Arnold Adams, Hospital Authority of Wilkes Co., d/b/a Wills Memorial Hospital,
Wills Memorial Hospital, Defendants-Appellees.

727 F.2d 1025 (11th Cir. 1984)

Before HENDERSON and HATCHETT, Circuit Judges, and JONES, Senior Circuit Judge.

ALBERT J. HENDERSON, Circuit Judge:

The issue presented by this case is whether the appellant, Kay Scoggins, was domiciled in South Carolina or Georgia at the time she filed this medical malpractice suit in the United States District Court for the Southern District of Georgia. Diversity of citizenship is alleged as the basis of federal jurisdiction pursuant to the provisions of 28 U.S.C. § 1332. All of the appellees-defendants are residents of Georgia. The district court concluded that Mrs. Scoggins was also a citizen of Georgia and dismissed the case for lack of subject matter jurisdiction. Finding that the district court was not clearly erroneous, we affirm.

Mrs. Scoggins and her husband lived in Washington, Georgia. He was a high school principal and Mrs. Scoggins worked as a media specialist in a grade school. As a result of Mr. Scoggins' sudden death in October, 1979, Mrs. Scoggins filed suit in October, 1981 against the doctors, clinic and hospital that treated him.

Mrs. Scoggins remained in Washington, Georgia for over a year after her husband's death. Rev. Robert Murphy, who counseled with her, stated that he advised her not to do anything for at least a year until she overcame her grief. Rev. Murphy Deposition at 13. Still, Mrs. Scoggins contended that she decided soon after her husband's death to leave Washington and start a new life somewhere else. Mrs. Scoggins Deposition at 131.

In January or February 1981 Mrs. Scoggins applied for admission to a one year Masters in Librarianship program at the University of South Carolina. After her acceptance in mid-April, 1981, she notified her employer, Dr. Fred Dorminy, of her intent to resign her job in the Wilkes County school system. She rented an apartment in West Columbia, South Carolina and began her course of study in August, 1981. Later she accepted a job as a graduate assistant, a position open only to students. She neither sold nor rented her house in Washington, Georgia. She and her two children stayed there occasionally when they were in Washington. She claimed that she was holding on to the house until she graduated and found a permanent job and then would use the proceeds of the sale to purchase a new home. Mrs. Scoggins Deposition at 132-33.

The district court correctly noted that a change of domicile requires "[a] concurrent showing of (1) physical presence at the new location with (2) an intention to remain there indefinitely" Opinion at 4. *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir.), *cert. denied*, 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed.2d 70 (1974); *Stine v. Moore*, 213 F.2d 446 (5th Cir.1954). The plaintiff bears the burden of proving her domicile by a preponderance of the evidence. *Vacca v. Meetze*, 499 F.Supp. 1089 (S.D.Ga.1980).

It is undisputed that Mrs. Scoggins was physically present in South Carolina when she filed this suit. She had rented an apartment, registered to vote, registered her car and obtained a

South Carolina driver's license. After a summer vacation she apparently was in South Carolina full time once classes began. The second element of the test, her intent to remain in South Carolina indefinitely, however, presents a greater problem. The district court found that she initially went to South Carolina to undertake graduate studies and had not positively decided upon her residence after graduation. Citing 13 WRIGHT, MILLER & COOPER, *Federal Practice and Procedure* § 3613 (1975), the district court stated that out-of-state students are usually regarded only as temporary residents and "[i]t is therefore usually presumed that they retain their domicile at their former place of abode." Opinion at 10. Because Mrs. Scoggins lacked the requisite intent to remain in South Carolina and was still a Georgia domiciliary, the district court then dismissed the suit for lack of jurisdiction.

* * *

Mrs. Scoggins clearly intended to leave Washington, Georgia, but her plans after that were more nebulous. Instead of consistently exhibiting an intent to remain in South Carolina, there were many indications that she considered moving to Florida or even returning to Georgia.

Rev. Murphy stated that he discussed cities like Atlanta with Mrs. Scoggins and that "[s]he did name to me on more than one occasion that she was having thoughts of perhaps teaching in Florida." Rev. Murphy Deposition at 15. Further,

she never indicated to me that she had made any plans to settle in South Carolina, nor did she say she didn't. The fact is, she didn't exclude Georgia really in her conversations to me.

Id. at 24. Dr. Dorminy, the county school superintendent in Wilkes County, testified by deposition that Mrs. Scoggins "indicated that when she finished her work at the University of South Carolina, that Florida was a possibility." Dorminy Deposition at 17. Dr. Dorminy additionally remarked that she told him she was unsure where she would go after graduation and she did not say anything to him suggesting that she considered South Carolina as her permanent home. *Id.* at 13, 17.

Mrs. Scoggins herself testified that her plans at the time were unsettled. "My intentions were to leave Georgia. I really didn't know where I was going, but I intended to leave Washington. I did not intend to live there any longer. I had options of where to go." Mrs. Scoggins Deposition at 160. Initially, it appears that she went to South Carolina solely to pursue her graduate studies. The University of South Carolina offered one of the few accredited programs in which she was interested. When asked when she decided to move to South Carolina, she replied "[a]fter I received my acceptance from the University of South Carolina." *Id.* at 134. Also,

Q. The only reason you went was to go to school then--you didn't go to Columbia for any other reason, except to go to the University of South Carolina, is that correct?

A. That's where I was accepted, so that's why I am in Columbia, South Carolina.

Id. at 158.

* * *

Although Mrs. Scoggins may now intend to remain in South Carolina, we must look to the facts as of the date she filed this suit. She initially moved to South Carolina as a student. Even if she did not intend to return to Georgia, she was undecided about her future plans. Her domicile before she moved to South Carolina continued until she obtained a new one. Georgia remained Mrs. Scoggins' domicile for diversity purposes. We also note that the Court of Appeals for the Eighth Circuit, also in a medical malpractice case, dismissed the diversity suit of a student in Ohio against a Missouri doctor, holding that the student retained his Missouri domicile

because he lacked the intent to remain in Ohio. *Holmes v. Sopuch*, 639 F.2d 431 (8th Cir.1981). The district court's finding that Mrs. Scoggins was a Georgia domiciliary is supported by the record and is not clearly erroneous.

* * *

For the foregoing reasons, the judgment of the district court dismissing the complaint for lack of jurisdiction is AFFIRMED.

Jacob Traber BURNS, Plaintiff-Appellant,

v.

David L. ANDERSON and United States Fidelity & Guaranty Company, Defendants-Appellees.

502 F.2d 970 (1974)

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit judges.

JOHN R. BROWN, Chief Judge:

The question on this appeal is whether a district court may dismiss a personal injury diversity suit where it appears 'to a legal certainty' that the claim was 'really for less than the jurisdictional amount.'

The suit grew out of an auto accident in which plaintiff Burns' automobile was struck amidst by that of defendant Anderson. Burns' principal injury was a broken thumb. He brought the action in the Eastern District of Louisiana, claiming \$1,026.00 in lost wages and medical expenses and another \$60,000.00 for pain and suffering. After a pre-trial conference and considerable discovery, the District Court dismissed for want of jurisdiction. Plaintiff appeals.

The test for jurisdictional amount was established by the Supreme Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). There, the Court held that the determinant is plaintiff's good faith claim and that to justify dismissal it must appear to a legal certainty that the claim is really for less than the jurisdictional amount. There is no question but that this is a test of liberality, and it has been treated as such by this Court. This does not mean, however, that Federal Courts must function as small claims courts. The test is an objective one and, once it is clear that as a matter of law the claim is for less than \$10,000.00, the Trial Judge is required to dismiss.

In the instant case, the District Judge dismissed only after examination of an extensive record. This record included the testimony of three doctors who treated Burns, as well as his own deposition. The accident occurred on May 26. The evidence is without contradiction that by the middle of August only very minimal disability remained. By December, even this minor condition had disappeared. Burns' actions speak even more strongly than the medical testimony. In his deposition he testified that he took a job as a carpenter's assistant on June 21 or 22-- less than a month after the accident. He did heavy manual labor for the remainder of the summer with

absolutely no indication of any difficulty with his thumb. It is equally clear that any pain he suffered was not of very great magnitude or lasting duration. Burns admitted that by the end of July there was no pain whatsoever. As a matter of fact, the evidence reveals that the only medication he ever received was a single prescription on the day of the accident for Empirin, a mild aspirin compound. Nor did his special damages take him a significant way down the road to the \$10,000.00 minimum. His total medical bills were less than \$250.00. Although he claims \$800.00 in lost wages, it is difficult to see how this could have amounted to even \$300.00 at Burns' rate of pay that summer.

The point of this fact recitation is that it really does appear to a legal certainty that the amount in controversy is less than \$10,000. . . .

Neither are we affected by plaintiff's plaintive plea that he is being deprived of a jury trial. The question in this case is not whether Burns is entitled to a trial by jury but rather where that trial is to be. We hold only that the case cannot be tried in the Federal Court because competence over it has not been granted to that Court by Congress.

Affirmed.

Supplemental jurisdiction

UNITED MINE WORKERS OF AMERICA, Petitioner,
v.
Paul GIBBS.

383 U.S. 715 (1966)

Mr. Justice BRENNAN delivered the opinion of the Court.

Respondent Paul Gibbs was awarded compensatory and punitive damages in this action against petitioner United Mine Workers of America (NMW) for alleged violations of s 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, as amended, and of the common law of Tennessee. The case grew out of the rivalry between the United Mine Workers and the Southern Labor Union over representation of workers in the southern Appalachian coal fields.

* * *

The suit was brought in the United States District Court for the Eastern District of Tennessee, see, and jurisdiction was premised on allegations of secondary boycotts under s 303. The state law claim, for which jurisdiction was based upon the doctrine of pendent jurisdiction, asserted 'an unlawful conspiracy and an unlawful boycott aimed at him and (Grundy) to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage.'

* * *

I.

A threshold question is whether the District Court properly entertained jurisdiction of the claim based on Tennessee law.

* * *

With the adoption of the Federal Rules of Civil Procedure and the unified form of action, Fed.Rule Civ.Proc. 2, much of the controversy over 'cause of action' abated. The phrase remained as the keystone of the Hurn test, however, and, as commentators have noted, has been the source of considerable confusion. Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged. Yet because the Hurn question involves issues of jurisdiction as well as convenience, there has been some tendency to limit its application to cases in which the state and federal claims are, as in Hurn, 'little more than the equivalent of different epithets to characterize the same group of circumstances.' 289 U.S., at 246.

This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under (the) Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *,' U.S.Const., Art. III, s 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without

regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.

That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong. In the present case, for example, the allowable scope of the state claim implicates the federal doctrine of pre-emption; while this interrelationship does not create statutory federal question jurisdiction, *Louisville & N.R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126, its existence is relevant to the exercise of discretion. Finally, there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial, Fed.Rule Civ.Proc. 42(b). If so, jurisdiction should ordinarily be refused.

* * *

28 U.S.C. § 1367 Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 13, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

SOME HYPOTHETICALS ON § 1367 SUPPLEMENTAL JURISDICTION

1. Plaintiff of MN sues Defendant 1 of SD, and Defendant 2 of MN, for a tort.
2. Plaintiff of MN sues Defendant 1 of SD, and Defendant 2 of MN, for a federal securities law violation.
3. Plaintiff of MN sues Defendant of SD for a federal securities law violation, and in Count II adds a claim for an unrelated tort.
4. Plaintiff of MN sues Defendant of SD for a tort.
 - (A) Defendant third-parties in a corporation with dual citizenship of SD and MN.
 - (B) Third-party defendant counterclaims against Defendant out of same tort transaction.
 - (C) Third-party defendant asserts Rule 14 claim directly against Plaintiff—same transaction.
 - (D) Plaintiff asserts Rule 14 claim directly against Third-party defendant—same transaction.
5. Plaintiff of MN sues Defendant of SD for a tort. Defendant counterclaims for an unrelated contract claim. Plaintiff third-parties in X of SD for indemnity on the contract. Defendant asserts a Rule 14 claim directly against X.
6. Plaintiff 1 of MN and Plaintiff 2 of SD sue Defendant of SD on a contract claim.
7. Plaintiff of MN sues Defendant 1 of MN on a federal civil rights claim, and also names Defendant 2 of MN as an additional defendant on a state law claim.
8. Plaintiff of MN, with an individual claim of \$100,000, sues on behalf of himself and all others similarly situated, against Defendant of SD, for a class recovery. All of the other members of the proposed class have claims less than \$75,000.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such actino is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.